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NO. 84-746

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

MOTION OF APPELLEE AGRICULTURAL LABOR RELATIONS BOARD TO AFFIRM

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QUESTION PRESENTED

1. Is mere enactment of a state agricultural labor relations statute, which -- much as the original National Labor Relations Act -- permits labor organizations and employers to negotiate union shop agreements, sufficient governmental action to invoke constitutional scrutiny?

EDITOR'S NOTE

PAGES ii thru 31 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
STATE OF THE CASE	1
ARGUMENTS	3
I. THE COURT OF APPEAL CORRECTLY DETERMINED THAT NO STATE ACTION IS PRESENT IN THE EXISTENCE OF UNION SECURITY CLAUSES NEGOTIATED UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT.	4
II. APPELLANT FAILED TO PROPERLY RAISE HER OTHER ARGUMENTS ON STATE ACTION TO THE CALIFORNIA COURT OF APPEAL; MOREOVER THESE ADDITIONAL ARGUMENTS ARE WITHOUT MERIT.	22
CONCLUSION	30

LIST OF AUTHORITIES CITED

CASES	PAGES
Abood v. Detroit Board of Education (1977) 431 U.S. 209	Passim
Adams v. Southern Calif. First Nat. Bank (9th Cir. 1974) 492 F.2d 324	16
Brotherhood of Railway and Steamship Clerks v. Allen (1963) 373 U.S. 113	14
Cardinale v. Louisiana (1969) 394 U.S. 437	24
Chavez v. Sargent (1959) 52 Cal.2d 162	9,10
Colgate-Palmolive-Peet Co. v. N.L.R.B. (1949) 338 U.S. 355	9,28
Ellis v. Brotherhood of Railway Clerks (1984) __ U.S. __ [104 S.Ct. 1883]	22
Englund v. Chavez (1972) 8 Cal.3d 572	10
Gabaldon v. United Farm Workers Organizing Committee (1974) 35 Cal.App.3d 757	8,9
Herndon v. State of Georgia (1935) 295 U.S. 441	24,25
Illinois v. Gates (1983) __ U.S. __ [103 S.Ct. 2317]	34

LIST OF AUTHORITIES CITED
(Continued)

CASES	PAGES
International Association of Machinists v. Street (1961) 367 U.S. 740	14
Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345	23,28,29
Kolinske v. Lubbers (D.C. Cir. 1983) 712 F.2d 471	21
Linscott v. Miller Falls Co. (1st Cir. 1971) 440 F.2d 14	5,21
Machinists Association v. Street (GA 1959) 108 S.E.2d 796	14
McGoldrick v. Compagnie General Transatlantique (1940) 309 U.S. 430	25
Messner v. Journeymen Barbers, Etc. International Union (1960) 53 Cal.2d 873	1[illegible]
Otten v. Baltimore & O. R. Co. (2nd Cir. 1953) 205 F.2d 58	15
J.F. Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581	8
Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350	4,31
People v. Mascotti (1962) 206 Cal.App.2d 772	25

LIST OF AUTHORITIES CITED
(Continued)

CASES	PAGES
Petri Cleaners, Inc. v. Automotive Employees, Etc. (1960) 53 Cal.2d 455	9,10
Prince v. Hill (1915) 170 C. 193	25
Railway Employees Dept. v. Hanson (1956) 351 U.S. 225	Passim
Reid v. McDonnell Douglas Corporation (10th Cir. 1971) 443 F.2d 408	21
Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379	8
Shelley v. Kraemer (1948) 334 U.S. 1	23,26,27
Silva v. Mercier (1949) 33 Cal.2d 704	9,28
Street v. New York (1969) 394 U.S. 576	26
Webb v. Webb (1981) 451 U.S. 493	26
Wicks v. Southern Pacific Co. (9th Cir. 1956) 231 F.2d 130	14,15,16

LIST OF AUTHORITIES CITED
(Continued)

	PAGES
STATUTES	
California	
Labor Code section 1140, et seq.	3
1141	10
1153	23
1153(c)	Passim
1154	23
1160	27
1165	27
Federal	
National Labor Relations Act section 8(a)(3)	21

STATEMENT OF THE CASE

Appellant Maria Guadalupe Navarro is an agricultural employee of Grower's Exchange, Inc. In January of 1979, Navarro's union, United Farm Workers of America, AFL-CIO (UFW), called a strike against her employer. In July of 1979, Navarro -- fully aware that UFW rules prohibited a member from working during a strike -- returned to work at Grower's Exchange, Inc., claiming economic necessity. On December 21, 1979, the UFW and Growers Exchange, Inc. reached agreement on a new collective bargaining contract which, like the previous contract, included a union security clause requiring membership in the union as a condition of employment. Such an agreement, termed a "union shop" and long permitted under California common law, is also permitted by California Labor Code section 1153(c).

UFW members, Navarro's co-workers,

brought charges against her for her strike-breaking activities. Although internal union disciplinary proceedings were held and Navarro was sanctioned, the Agricultural Labor Relations Board (ALRB or Board) overturned the union's actions, ordering that she be reinstated and made whole for economic losses she suffered as a result of the sanctions (Navarro had lost her membership in the union, and was subsequently fired). (Jurisdictional Statement (J.S.), App. A.)

Despite these remedies, Navarro sought review in the State Court of Appeal, pursuing a constitutional challenge to California Labor Code section 1153(c). Upon review of the Board decision, and of the various arguments concerning Navarro's constitutional claims, the Court of Appeal held that no governmental action was involved in the parties' inclusion of the union security provision in the UFW/Growers

Exchange collective bargaining agreement. The Court of Appeal therefore rejected Navarro's constitutional attack on the statute. (J.S. App., B-26 - B-41.)

ARGUMENT

Appellant presents two grounds for urging that the California Court of Appeal erred in interpreting the Agricultural Labor Relations Act (ARLB or Act)[1/] so as to find no state action in the statute's permissive treatment of contractual union security clauses. First, Navarro argues that state action is present in the fact that the ALRA does not prohibit union security provisions requiring union membership. Second, if state action is present, appellant contends that the statute violates the First Amendment guarantee of freedom of association, the "fundamental right to work," and

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1. The ALRA is found at California Labor Code section 1140, et seq.

the Equal Protection Clause of the Fourteenth Amendment.

In this preliminary motion, Appellee ALRB will not discuss the second issue because, as the California Court of Appeal determined, no state action is present. Appellee will also demonstrate that -- of those issues which were presented to it -- the Court of Appeal analyzed each correctly. The ALRB therefore urges this Court to summarily affirm the opinion of the California Court of Appeal in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350. (J.S., App. B.)

I

THE COURT OF APPEAL CORRECTLY DETERMINED THAT NO STATE ACTION IS PRESENT IN THE EXISTENCE OF UNION SECURITY CLAUSES NEGOTIATED UNDER THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT.

The Court of Appeal correctly determined that California Labor Code section 1153(c) (J.S., App. I) does not involve the government in the decision of a

labor organization and an employer to negotiate union security agreements. In her argument to the state court, urging that state action be found, Navarro argued only that (1) the Board, in an earlier administrative decision, had conceded state action; (2) the California Constitution required a finding of state action; and (3) this Court's decision in Railway Employees Dept. v. Hanson (1956) 351 U.S. 225, and the First Circuit's decision in Linscott v. Miller Falls Co. (1st Cir. 1971) 440 F.2d 14 require a finding of state action in the operation of the ALRA.

The California Court of Appeal succinctly and correctly rejected each of these arguments. The first two do not present any possible federal question, and will not be discussed herein. The third argument ignores the fact that -- contrary to the Railway Labor Act (RLA), the statute under consideration in the Hanson decision --

California Labor Code section 1153(c) is a "passive" statute, mandating nothing whatsoever. In this sense, the ALRA is identical to the National Labor Relations Act (NLRA).

On its face, the ALRA is couched in exclusionary language. That is to say, section 1153(c) does no more than state that, if an employer and a union agree to the inclusion of a union shop clause in their collective bargaining agreement, the law will not treat such a clause as an unfair labor practice. Such clauses, if agreed to, are exempted from the class of conduct which the ALRA elsewhere defines to be unfair labor practices.

But the significance of the exclusionary cast of the statute is not only in the fact that the statute does not compel anything. For if, prior to the enactment of section 1153(c), the law in California prohibited union shop agreements, then

section 1153(c) would represent an important change in law, authorizing such agreements where they had once been precluded.

However, the plain fact is that section 1153(c) did not change California law, and this is the deeper significance of the statute's passive character. Section 1153(c) merely declares that the law in ~~California in existence prior to the enact~~ment of the ALRA will remain unchanged by that Act. The statute, therefore, does not authorize union shop agreements so much as it clarifies that the pre-existing right of an employer and a union to enter into a union shop agreement is not altered by the statutory provision defining and prohibiting unfair labor practices, so long as the union involved is the duly certified representative of the employees.

For nearly 80 years, California has permitted the union shop -- indeed, it has permitted even the "closed" shop. The ALRA

merely continued in existence this long-standing state policy. And it is precisely because section 1153(c) did not change the law in this respect, and does not create new rights or obligations, that Navarro's constitutional claims must fail. To invalidate section 1153(c) would effectively result in judicial legislation, prohibiting that which the California Legislature and the California courts have deliberately and consistently permitted: the union shop.

The ability of a union and employer to enter into a collective bargaining agreement providing for a union shop -- or even a closed shop -- has roots deep in California law. (See, e.g., J.F. Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 598-600; see also, Shafer v. Registered Pharmacists Union (1940) 16 Cal.2d 379, 387 ["The courts of this state have recognized the validity of closed union shop agreements for more than thirty years"]; Gabaldon v.

United Farm Workers Organizing Committee (1974) 35 Cal.App.3d 757, 766-768; Colgate-Palmolive-Peet Co. v. N.L.R.B. (1949) 338 U.S. 355, 361-362.)

The California Supreme Court has even affirmed a superior court's issuance of a preliminary injunction restraining breach of a collective bargaining agreement's union security clause. (Silva v. Mercier (1949) 33 Cal.2d 704 [Complaint charged employer with improperly retaining workers who had failed to join the union.].)

In 1959, sixteen years before passage of the ALRA, the California Supreme Court expressly found that California law did not preclude union security agreements, so long as they were negotiated by a duly authorized collective bargaining representative of the employees. (Chavez v. Sargent (1959) 52 Cal.2d 162.)

In Petri Cleaners, Inc. v. Automotive Employees, Etc. (1960) 53 Cal.2d

455, the Supreme Court reversed the Chavez limitation on union security clauses. In Petri, the Supreme Court stated:

> We conclude that employers are not required by law to engage in collective bargaining and the closed or union shop agreements and concerted activities to achieve them are lawful in this state whether or not a majority of the employees directly involved wish such agreements. . . If a contrary rule is to be established, the Legislature, not this court, must enact it.

(53 Cal.2d at 474, 475; emphasis added; see also Messner v. Journeymen Barbers, Etc. International Union (1960) 53 Cal.2d 873; Englund v. Chavez (1972) 8 Cal.3d 572.)

It was against this background that the California Legislature in 1975 enacted the ALRA. Modeled after the National Labor Relations Act (NLRA), the ALRA creates a five-member quasi-judicial administrative tribunal to administer the Act's provisions. (Cal. Lab. Code, sec. 1141.) The ALRA expressly vests agricultural employees with organizational rights. In this regard, the

ALRA is nearly identical to the NLRA.

The ALRA also defines certain forms of conduct as "unfair labor practices." Although the Act states that it will be an unfair labor practice for an agricultural employer, by any term or condition of employment, "to encourage or discourage membership in any labor organization", an exception was provided for union security agreements. (Cal. Lab. Code sec. 1153(c).)

By enacting Labor Code section 1153(c), the Legislature therefore merely codified existing state law governing the enforceability of union shop agreements. In essence, the ALRA did nothing more than limit the scope of California's previous "laissez faire" approach to the issue by restricting such negotiations to elected representative unions. Far from creating a union right to negotiate a union shop agreement, the Act actually limited the pre-existing right, so as to ensure that the

bargaining union has majority support among the affected employees.

Quite apart from the fact that California's long history of permitting union shop agreements was not materially altered by Labor Code section 1153(c), there is the fact that the statute is, in any event, permissive and not mandatory. This is the critical fact that appellant ignores, and it is the basis for the California Court of Appeal's determination that no state action exists in the operation of the ALRA.

The California situation stands in sharp distinction to that described in Railway Employees' Department v. Hanson, supra, 351 U.S. 225. There, the Supreme Court preliminarily noted that the union shop provision of the federal RLA was only permissive: "Congress has not compelled nor required carriers and employees to enter into union shop agreements." (351 U.S. at 231.) However, contrary to the law in

California, the State of Nebraska had adopted a constitutional amendment prohibiting union shop agreements, whereas the RLA contained a provision permitting union security agreements notwithstanding the law of any state. The Hanson court concluded that, by virtue of the Supremacy Clause of Article VI of the United States Constitution, federal law superseded state law and made union security clauses permissible where they had been otherwise prohibited. This conflict was the source of governmental action which brought a constitutional dimension to the employees' objection to the contract: "If private rights are being invaded, it is by force of an agreement made pursuant to a federal law which expressly declares that state law is superseded. [Citations.] The enactment of the federal statue authorizing union shop agreements is the governmental action on which the Constitution operates, though it

takes a private agreement to invoke the federal section." (351 U.S. at 232; emphasis added.)

The same reasoning was used by the Supreme Court in International Association of Machinists v. Street (1961) 367 U.S. 740, which involved a conflict between the Railway Labor Act and a Georgia "right-to-work" statute (see Machinists Association v. Street (GA 1959) 108 S.E.2d 796), and in Brotherhood of Railway and Steamship Clerks v. Allen (1963) 373 U.S. 113, each involving a conflict between the permissive federal provision and the prohibitive state law. It was precisely that conflict which provided the requisite governmental action necessitating the consideration of constitutional issues. But the same result does not necessarily obtain where no such conflict exists.

The most recent Ninth Circuit holding on the issue is apparently Wicks v.

Southern Pacific Co. (9th Cir. 1956) 231 F.2d 130, cert. den. 351 U.S. 946.[2/] There, the circuit court ruled that a statue which merely permits a union shop agreement does not supply the requisite state action to invoke constitutional restraints. Moreover, addressing California's particular situation, the court gave this analysis:

> It was pointed out in [Otten v. Baltimore & O. R. Co. (2nd Cir. 1953) 205 F.2d 58], that there "might" be a substantial constitutional issue if state law prohibited the union shop while the amendment of Congress permitted the union shop. But the Second Circuit found no substantial constitutional issue on this ground as New York law did not prohibit the union shop. Here again, these cases before us fall within the facts of the Otten case. California, like New York, permits union security agreements, including a form even more liberal than the so-called union shop, namely the "closed shop."

(231 F.2d at 136-137; emphasis in orginial.)

(C.f., Adams v. Southern Calif. First Nat.

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2. Significantly, this Court denied certiorari in the Wicks case one week after its issuance of Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225.

Bank (9th Cir. 1974) 492 F.2d 324, 328-329.)

This Court's recent decisions would seem to be consistent with the Ninth Circuit's Wicks reasoning. In Abood v. Detroit Board of Education, (1977) 431 U.S. 209, this Court expressly declined to extend constitutional restraints to private collective bargaining agreements absent some additional showing of state action.

In Abood, appellant employees sought to distinguish the ruling in Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225, which permitted dues collections from non-members, on the ground that unlike the employer in Hanson, their employer was a public entity and should therefore be held to stricter constitutional standards. It will be remembered that, in Hanson, this Court found that union security clauses under the RLA did not violate the First or Fifth Amendments of the United States Constitution; the appellants in Abood argued

that a different result should obtain where the employer is the government. (431 U.S. at 226.)

This Court rejected appellants' efforts; state action, it ruled, is state action, whether that action results from the fact that the actor is the government itself, or from the fact that the actor acts pursuant to legislation. The Court noted that, in Hanson, the requisite governmental action was found in the fact that the union security provisions at issue would have been unenforceable but for the RLA's language expressly superseding conflicting state law. Having found state action, the Hanson Court nevertheless found no constitutional deprivation. No "greater" state action was provided by the facts in Abood, the Court held. (431 U.S. at 226.)

The majority's conclusion -- that its reliance on the Hanson constitutional analysis of the union security clause did

not depend upon the existence of a governmental employer -- drew sharp criticism from the dissent. The dissent read the majority's reasoning as holding "that the same constitutional constraints invariably apply when the government fosters or encourages a result in the private sector by permissive legislation as when it commands that result by the full force of law." (431 U.S. at 251, n. 5, conc. opn. of Powell, J.) Unlike the RLA, the Michigan statute at issue in Abood did not create the right to negotiate an agency shop agreement where such agreements were otherwise proscribed; like California's Labor Code section 1153(c), it merely provided that such agreements were not prohibited by state law. (See 431 U.S. at 214, n. 17.) It thus appeared to the dissent that the Abood majority had relied upon the Hanson analysis because, as in Hanson, the union security agreements at issue were authorized by statute; Justice

Powell would distinguish between permissive legislation and mandatory legislation.

The majority responded to the dissent's concern by expressly disavowing his construction of their reasoning. Hanson was applicable, the majority said, not because it found state action pursuant to the RLA, but because -- having found governmental action in the conflict between the RLA and the Nebraska statute -- the constitutional analysis of the union security agreement was relevant to the analysis in Abood:

> Nothing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints [citation to Justice Powell's opinion]. We compare the agency shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question.

(431 U.S. at 225, n. 23.)

Thus, this Court expressly eschewed any suggestion that the result in Abood

would have been the same whether or not the employer was a public entity. Indeed, in view of the vigor with which the majority answered the dissent's concern, it would not be unreasonable to conclude that the majority would have reached a different result had the employer been a private party operating under Michigan's permissive statute. It is thus true that the Abood court found no constitutional distinctions between the First Amendment rights of public and private sector employees; this is so, however, only when governmental action has resulted in a deprivation of constitutional rights to the private sector employee. Though governmental action was the source of the alleged deprivation in the Hanson case, it is not the source of Navarro's grievance here.

In any event, the expressed and unequivocal disavowal by the majority in footnote 23 of the Abood decision makes

abundantly clear that Abood is of no help to Navarro in this case. And, although the Ninth Circuit has yet to comment on footnote 23, the Court of Appeal for the District of Columbia Circuit -- citing footnote 23 in Abood -- has expressly ruled that "the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible." (Kolinske v. Lubbers (D.C. Cir. 1983) 712 F.2d 471; see also Reid v. McDonnell Douglas Corporation (10th Cir. 1971) 443 F.2d 408.) The only contrary decision actually analyzing state action under the NLRA is Linscott v. Miller Falls Co., supra 440 F.2d 14. And, as the California Court of Appeal noted, the Linscott majority opinion issued before the 1977 Abood decision of this Court which made clear that the state action in Hanson depended on the preemptive aspect of

the RLA. The NLRA of course does not pre-empt any contrary state authority prohibiting union shops; it is a passive statue much like the ALRA.[3/]

II

APPELLANT FAILED TO PROPERLY RAISE HER OTHER ARGUMENTS ON STATE ACTION TO THE CALIFORNIA COURT OF APPEAL; MOREOVER THESE ADDITIONAL ARGUMENTS ARE WITHOUT MERIT.

Appellant Navarro raises two additional arguments in support of her

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3. Pasillas also cites Ellis v. Brotherhood of Railway Clerks (1984) ___ U.S. ___ [104 S.Ct. 1883] for the proposition that this Court has decided the state action question. Ellis, decided under the Railway Labor Act, arose in California where, as noted, no conflicting "right-to-work" statute exists. The conflict noted in the Hanson case is therefore not present; this Court nonetheless addressed several constitutional issues. However, as the California Court of Appeal noted, neither the Ninth Circuit, which merely assumed the Hanson case applied, nor this Court actually addressed the issue of state action. Ellis does not therefore appear to be controlling on the issue. Furthermore, Pasillas' interpretation of the Ellis decision is at odds with a long line of previous federal authority, none of which was discussed in the Ellis opinion.

assertion of state action, both of which were raised for the first time in a petition for rehearing to the California Court of Appeal. Navarro argues that the analysis of Shelley v. Kraemer (1948) 334 U.S. 1, finding state action in the judicial enforcement of racially restrictive covenants, is analogous to (1) the enforcement powers of the ALRB, (2) judicial review of ALRB orders, and (3) suits for enforcement of collective bargaining agreements which are authorized by the ALRA. (J.S. 7-8; 11-13.) Navarro also argues that the "close nexus" analysis of this Court's decision in Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345 applies to this case because the ALRB reviews for "reasonableness" internal union rules which result in worker discipline. (Cal. Lab. Code secs. 1153, 1154.) However, as these arguments were not properly raised to the state court, they cannot now be considered by this Court. And even if they

were properly raised, these additional arguments are meritless.

A fundamental and long-settled rule governing this Court's review of a state court decision is that a federal question must first be raised to the state tribunal. The attempt to raise an issue upon petition for rehearing is too late, unless the state court actually entertains the question. (Herndon v. State of Georgia (1935) 295 U.S. 441, 443; Cardinale v. Louisiana (1969) 394 U.S. 437, 438; Illinois v. Gates (1983) ___ U.S. ___ [103 S.Ct. 2317].) This Court has indicated strong policy, as well as jurisdictional, grounds for this rule; namely, in our federal system, "it is important that state courts be given first opportunity to consider state statutes in light of [a] constitutional challenge." (Cardinale v. Louisiana, supra, 394 U.S. 437, 439; see also, Illnois v. Gates, supra, 103 S.Ct. 2323; McGoldrick v.

Compagnie Generale Transatlantique (1940) 309 U.S. 430, 434.)

Under California law, all relevant issues and arguments must be presented to the court before submission of the cause. Points cannot be raised for the first time in a petition for rehearing. (Prince v. Hill (1915) 170 C. 193, 195; People v. Mascotti (1962) 206 Cal.App.2d 772, 779.) Therefore, although Navarro did raise these additional arguments in her petition for rehearing to the California Court of Appeal, the state court was not required to consider them, and indeed, did not do so. The appellate court's opinion deals solely with the issues raised by Navarro and her co-petitioners before the case was submitted for decision. This Court has recognized that, in such circumstances, the federal issue was never properly presented to the state court. (Herndon v. State of Georgia, supra, 295 U.S. 441.) This is especially

true where there is no discussion of the federal issues in the state court's opinion; this Court will assume, absent evidence to the contrary, that the lack of discussion is due to a failure to properly present the question in the state court. (Webb v. Webb (1981) 451 U.S. 493, 501; Street v. New York (1969) 394 U.S. 576, 581-582.) Appellee ALRB therefore respectfully urges this Court to refuse to consider these additional arguments concerning state action.

However, even if these issues are considered, an examination of appellant's contentions reveal that they fail to demonstrate state action. The Shelley v. Kraemer analysis must fail for several reasons. First and foremost, under no construction of law can it be said that the ALRB enforces union security agreements. The same is of course true for judicial enforcement of ALRB orders. The Board merely determines whether conduct is an

unfair labor practice under the Act. If so, the Board acts only to restrain the unlawful conduct. Section 1165 of the Act is as neutral as section 1153(c) with respect to union security agreements. Section 1165 authorizes suits in state court for breach of collective bargaining agreements -- whatever provisions they might contain -- but parties to such agreements enjoyed such a right long before the ALRA was enacted under California common law.

In any case, a Shelley v. Kraemer situation does not exist here; this case does not involve any effort to enforce a collective bargaining agreement -- judicially or administratively.[4/] And it

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4. The enforcement powers of the ALRB (Cal. Lab. Code sec. 1160.3) are therefore wholly irrelevant. Appellant makes reference to the "make whole" provision of the Act, which empowers the Board to order the compensation of economic losses suffered by victims of a party's refusal to bargain in

(Footnote continued----)

is interesting to note that both the California Supreme Court and this Court have long permitted judicial enforcement of union shop clauses. (E.g., Colgate-Palmolive-Peet Co. v. N.L.R.B., supra, 338 U.S. 335, 361-362; Silva v. Mercier, supra, 33 Cal.2d 704.)

Finally, appellant argues that the expansive powers of the Board, in reviewing the reasonableness of internal union rules, provides a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." (Jackson v. Metropolitan Edison Co., supra, 419 U.S. 345, 351.)

(----Footnote 4 continued)

good faith as required by the statute. This make whole provision is if no consequence to the decision of two private parties to negotiate a union security clause, nor would it be employed in suits for breach of collective bargaining agreements.

In the Jackson case, this Court found no state action in the mere fact that a business -- therein a private utility -- was subject to state regulation. In fact, this Court expressly held that:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required to obtain approval for practices a business regulated in less detail would be free to institute without approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility [termination of electric service without notice or hearing], where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."

(Id. at 357; emphasis added.)

Like the Pennsylvania Public Utility Commission in the Jackson case, the ALRB has in no way fostered or encouraged the private conduct challenged here. Such union security agreements have long been permitted under California law, and the ALRA changed nothing in this respect. In fact, if ALRA section 1153(c) is invalidated,

agricultural unions and employers will still be free to sign union shop agreements. Appellant would have only succeeded in eliminating the ALRA's protection against unreasonable union rules. Nor is the state involved in the enforcement of union security agreements. The ALRB's review of union rules is only triggered by the filing of a charge, and is limited to a determination of whether an unfair labor practice has been committed. No nexus, let alone a close nexus, exists between the State of California and the private collective bargaining agreements of labor unions and employers.

CONCLUSION

There being no state action here, the sole issue in the underlying ALRB proceeding was whether the UFW's membership rule -- which requires union members to respect union picket lines -- is "reasonable" as contemplated by California

Labor Code section 1153(c). This is obviously an issue of purely local concern, and one which the state administrative body and state courts have already addressed. In addition, since no state action is present, the California Court of Appeal did not find it necessary to reach appellant's other constitutional issues. Appellee Agricultural Labor Relations Board therefore respectfully moves this Court to affirm the decision of the California Court of Appeal, First Appellate District, in Pasillas, et al. v. Agricultural Labor Relations Board (1984) 156 Cal.App.3d 350.

Dated: December 5, 1984

Respectfully submitted,

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